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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 80

PAN AMERICAN PETROLEUM CORPORATION, a Delaware Corporation,
Petitioner,
v.
THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE sitting as a Judge of That Court, and CITIES SERVICE GAS COMPANY, a Delaware Corporation,
Respondents.

No. 81

TEXACO, INC., a Delaware Corporation,
Petitioner,
v.
THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE sitting as a Judge of That Court,
Respondents,
and
CITIES SERVICE GAS COMPANY, a Delaware Corporation,
Intervening Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR RESPONDENT CITIES SERVICE GAS COMPANY

CONRAD C. MOUNT,
CHARLES V. WHEELER,
First National Building,
Oklahoma City 1, Oklahoma,
JACK WERNER,
317 Wyatt Building,
Washington 5, D. C.
Attorneys for Respondent, Cities Service Gas Company.

Of Counsel:
RICHARD L. WILLIAMS,
HENRY N. HERNDON, JR.,
MORRIS, JAMES, HITCHENS & WILLIAMS,
Bank of Delaware Building,
Wilmington, Delaware;
HARRY S. LITTMAN,
ARNOLD L. TALISMAN,
RICHARD LITTELL,
Wyatt Building,
Washington 5, D. C.;
ROBERT T. GRANT,
First National Building,
Oklahoma City 1, Oklahoma,
March, 1961.

OKLAHOMA TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR RESPONDENT CITIES SERVICE GAS COMPANY

OPINIONS BELOW

Certiorari was granted by this Court to review the judgment of the Supreme Court of Delaware denying its Writ of Prohibition to the Superior Court of New Castle County State of Delaware. The Writ was sought by Petitioners to prohibit such Superior Court from proceeding to hear and determine separate actions filed in such Court by the Respondent, Cities Service Gas Company, against

each of the Petitioners. The Opinion of the Supreme Court of Delaware is reported at 158 A.2d 478 (R. 33-46).

In the trial court Petitioners filed Motions for Summary Judgment. The Motion of Pan American has never been ruled upon. In overruling the Motion of Texaco, Inc., the Superior Court wrote an Opinion which is reported at 155 A.2d 878 (R. 8-21). The Order denying Texaco's Motion for Summary Judgment was an interlocutory order from which no appeal was afforded. This is not a review of that Order.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for a Writ of *Certiorari*.

QUESTION PRESENTED

Does Section 22 of the Natural Gas Act oust a state court of its jurisdiction to entertain plaintiff's causes of action, admittedly based upon common-law theories, because the defendant alleges, as one of several defenses, a defense based upon the Natural Gas Act?

STATUTE INVOLVED

The provision of the Federal statute involved is Section 22 of the Natural Gas Act, 52 Stat. 833 (1938), 15 U.S.C. 717(u). The portion of such statute involved here reads as follows:

> "The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the

United States *shall have exclusive jurisdiction* of violations of this chapter or the rules, regulations, and orders thereunder, and *of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder.* * * *"[1]

STATEMENT OF THE CASE

Petitioners seek review of an opinion and final judgment of the Supreme Court of the State of Delaware denying their petition for a writ prohibiting Cities Service Gas Company (Cities), the Superior Court of the State of Delaware in and for New Castle County, and the Honorable Andrew D. Christie, sitting as a Judge of that Court, from proceeding further in Civil Actions 671 and 722 (R. 1-7, 33-48). In Civil Actions 671 and 722, Cities seeks money judgments for involuntary payments made in excess of the contract price to Petitioners for purchase of natural gas (R. 52-59, 232-237). Petitioners' request for a Writ of Prohibition was predicated entirely on the ground that "a state court has no jurisdiction of the subject matter of these civil actions" (R. 2). The Supreme Court of Delaware denied the Petition for a Writ of Prohibition on the ground that the subject matter of the complaints was founded on private contracts deriving their force from state law (R. 41).

Cities and the Petitioners are all Delaware corporations. Cities is a natural gas pipe line company subject to the jurisdiction of the Federal Power Commission. Petitioners are producers of natural gas who are also subject

[1] Unless otherwise indicated, emphasis is supplied throughout this brief.

to the jurisdiction of the Federal Power Commission. Cities purchases natural gas from Petitioners and others, and transports and sells such gas to local distributing companies for resale to the general public.

In 1949 and 1950, Cities entered into fixed price contracts with Petitioners to purchase natural gas produced by Petitioners from the Hugoton Field in Kansas. In each case, the price agreed upon was less than 11¢ per thousand cubic feet (Mcf) at a pressure base of 14.65 psia[2] (R. 68-109, 238-259).

On December 2, 1953, the Corporation Commission of the State of Kansas promulgated an order, effective January 1, 1954, fixing a minimum price of 11¢ per Mcf to be paid for natural gas produced from the Kansas-Hugoton Field (R. 261-268). The effect of this order was, of course, to require Cities to pay Petitioners higher prices than agreed upon in the respective contracts. Cities immediately instituted proceedings for judicial review of the order.

Prior to making any payments for gas purchased subsequent to the effective date of the Kansas minimum price order, Cities sent a letter, dated January 21, 1954, to Petitioners notifying them that Cities had filed suit for judicial review of the order; that future payments by Cities, pursuant to the Kansas order, would be made to avoid the penalties provided by the Kansas statutes for violation; and that such payments, pending final judicial determina-

[2] Per square inch absolute.

tion of the validity of the order, "are to be considered and accepted by you as involuntary payments on our part, without prejudice to our rights in said litigation, and in no event as an acquiescence by us in the validity of said order" (R. 153-154, 609-610).[3] In the final paragraph of said letters, Cities stated (R. 154, 610):

> "In the event the said Order is finally judicially modified or declared to be invalid in whole or in part, as a result of which you have been overpaid for gas purchased during the interim aforesaid, Cities Service Gas Company will expect you to refund to it the amount of said overpayment."

Thereafter, each monthly voucher check sent to the Petitioners for gas purchased by Cities bore the legend that the payment was made subject to the provisions of the January 21, 1954 letter (R. 168, 614). Petitioners accepted all such checks, cashed them and made no objection to the conditions upon which they were tendered. Significantly, Texaco, by letter dated March 2, 1954, acknowledged receipt of Cities' payment of February 25, 1954, made no objections to the conditions of payment, but merely requested that part of the payments be sent to a different address in the future (R. 168-169). Pan American (formerly Stanolind) by letter to Cities dated January 27, 1954, stated (R. 611):

> "We construe the last paragraph of said [January 21, 1954] letter to mean that Cities will expect Stan-

[3] Texaco, Inc., was formerly The Texas Company. Pan American Petroleum Corporation was formerly Stanolind Oil and Gas Company. Columbian Fuel Corporation, formerly Petitioner in Case No. 82, was also a party to the proceeding below. It withdrew as a party to this appeal after a settlement of Cities' claims.

olind to refund to it the amount of overpayments, if any, without any interest thereon should the said Order of December 2, 1953, be finally judicially modified or declared to be invalid in whole or in part by an adjudication which would be binding and controlling on Stanolind. We will, therefore, accept payment on this basis."

It is also significant that after Cities sent its January 21, 1954 letter to Petitioners, Petitioners sent similar letters to their royalty owners and to owners of fractional interests in the Kansas-Hugoton Field notifying them that the Kansas order was being challenged; that they were receiving payments "* * * upon the condition * * * that in the event said order is held invalid, a refund be made to the purchaser of any amount so paid in excess of that payable in the absence of said order" (R. 588); that they would pay royalties and make payments to the owners of fractional interests pursuant to the Kansas order; but would expect refunds if the Kansas order was overturned (R. 200-203, 588-589). Thus, each Petitioner recognized that payment of the 11¢ price was made conditionally and subject to refund.

The impact of the Kansas minimum price order upon Cities together with other increased costs was such that on March 22, 1954, Cities was compelled to file increased rates with the Federal Power Commission in Docket No. G-2410. During such rate proceeding, the Commission was advised that Cities was paying 11¢ per Mcf to producers, such as Petitioners, as a result of the Kansas order and subject to the conditions set forth in its letter of January 21, 1954. On May 25, 1956, the Commission entered its order approving a settlement of that case (R. 556-586).

The settlement order provided that Cities is required to refund to its jurisdictional customers, in accordance with the formula set forth in the order, the major portion of the money obtained by Cities as a result of the very litigation involved herein (R. 566-567, 571-573).

Cities' suit challenging the validity of the Kansas minimum price order reached this Court in 1957. On January 20, 1958, this Court held that the Kansas order was void. *Cities Service Gas Company* v. *State Corporation Commission*, 355 U.S. 391. Thereafter, the Supreme Court of Kansas held that the Kansas order was void *ab initio* for lack of jurisdiction in the Kansas Corporation Commission to issue the order. *Cities Service Gas Company* v. *Kansas Corporation Commission*, 184 Kan. 540, 337 P.2d 640 (1959), *cert. den.* 361 U.S. 836 (1959).

Following the January 20, 1958, decision of this Court, Cities resumed payments for gas purchased from Petitioners at the contract prices instead of the State-ordered minimum price, and made demand upon Petitioners for repayment of the difference between the contract prices and the amounts actually paid for gas at the 11¢ price fixed in the void Kansas minimum price order. Petitioners refused to make refunds and Cities brought the actions below to recover such differences (R. 52-59, 232-237).

Briefly stated, Cities' complaints set forth common-law actions based upon express and implied contracts to refund overpayments or for restitution (R. 52-59, 232-237). Petitioners have repeatedly admitted that Cities' complaints are grounded solely on common-law bases.[1] At no place in

[1] R. 170, 219, 230, 616, 656; Pan American's Petition for a Writ of Certiorari, pp. 3, 6; Texaco's Petition for a Writ of Certiorari, p. 2.

Cities' complaints is any reference made to, or reliance placed upon, the Natural Gas Act or any orders, rules or regulations issued thereunder or any action taken pursuant thereto. Petitioners, however, raised *defenses* relating to the Act in their answers (R. 59-68, 620-635). The facts underlying these defenses are as follows:

While Cities was challenging the validity of the Kansas minimum price order, this Court issued its decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), holding that sales of natural gas by producers for resale in interstate commerce were subject to the jurisdiction of the Federal Power Commission, within the meaning of the Natural Gas Act. As a result of such decision, the Federal Power Commission on July 16, 1954, issued its Order 174 directing producers, such as Petitioners, making sales for resale in interstate commerce to file their contracts for such sales as their rate schedules.[5] "Rate Schedule" was defined as "* * * the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954 * * *" (18 C.F.R. 154.93). The order did not require the filing of any "schedule of rates" as claimed by Petitioners.[6] It merely ordered the filing of the above enumerated documents, which documents constituted the "rate schedule." In *Sun Oil Co.* v. *F.P.C.*, 364 U.S. 170, 172 (1960), this Court described such rate schedules as being "contract-rate-schedules."

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[5] Order 174 was later supplemented or replaced by Orders 174-A and 174-B.

[6] See Pan American Brief, p. 3, as compared with Texaco Brief, p. 6.

Purporting to comply with the Commission's Order 174, Petitioners submitted various documents to the Commission as their initial contract-rate-schedules. On September 26, 1954, Petitioner Texaco tendered "as its rate schedule" the basic contract between Cities and Texaco and a letter agreement amending the contract to cover additional acreage (R. 126-128). It also submitted sample billing statements indicating a price per Mcf of 11¢ *with the notation that such price was in accordance with the Kansas minimum price order* (R. 126-138), but did not file a copy of the Kansas order.[7] Texaco made no mention of Cities' letter of January 21, 1954, nor did it tender such letter as part of its rate schedule. At a later date, the Commission sent a letter to Texaco requesting it to submit the Kansas order and "any agreement by the buyer to pay the related rate on a contingent or conditional basis * * * *" (R. 149-150). Pursuant to such request, Texaco submitted the Kansas order and Cities' letter of January 21, 1954, which Texaco described as " * * * setting forth the contingent or conditional basis upon which the minimum rate will be paid" (R. 152-153).

On November 15, 1954, Pan American transmitted as its rate schedule, the basic contract between Pan American and Cities, 76 letters and agreements as amendments and supplements to the basic contract, a sample billing statement and the Kansas minimum price order (R. 591-599). In its covering letter Pan American stated that the initial rates were "set forth in the gas sales contract"

[7] The billing statement is not a part of the rate schedule as defined by the Commission Regulations, but is required to be attached thereto by a separate regulation [See 18 C.F.R. 154.93 and 18 C.F.R. 154.92(a)].

appended to the letter of transmittal (R. 591-592). With regard to the Kansas order, Pan American stated that such order had been declared valid by a court of competent jurisdiction and "said gas sales contract is, therefore, subject to said order and has been, in effect, amended thereby" (R. 597-598).

Thereafter, the Secretary of the Commission, pursuant to an unpublished minute of the Commission directing such action, wrote a form letter to Petitioners advising them that their tendered documents had been accepted for filing as rate schedules (R. 138-143, 601-607). The Commission's letters made no mention of an 11¢ rate, but simply listed the documents which had been tendered and accepted for filing (R. 138-143, 601-607).

Cities was not notified of the entry of the minute. Nor was it served with copies of the Secretary's letters to Petitioners.[8]

The 174 series of orders contained no provision requiring producers, such as Petitioners, to serve purchasers, such as Cities, with copies of the documents tendered pursuant to the orders. Nor did Order 174 make any provision for notification by the Commission to the purchasers of the filing or acceptance of the producer rate schedules. The

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[8] When Petitioners filed their contract-rate-schedules with the Commission, they simultaneously filed applications for certificates of public convenience and necessity to continue the service being rendered to Cities. On December 5, 1955, the Commission issued a certificate to Texaco authorizing it to continue to render the service set forth in the contracts (R. 179-190). As will be discussed in greater detail hereinafter, on December 1, 1960, the Commission issued a certificate to Pan American to render the service set forth in the contracts and stated that the dispute as to the price may reasonably be left for disposition by the courts (Appendix A, hereto).

rate filings pursuant to Order 174 were not docketed by the Commission, no provision for any hearing was contained in the order and none was held (18 C.F.R. 154.92, *et seq.*).

Based on its view of the above described rate schedule filing, Texaco, on January 30, 1959, filed a motion for summary judgment with the Superior Court of Delaware, wherein it contended that (R. 170-171): (1) From January 1, 1954, to July 16, 1954 (date of issuance of FPC Order 174) the only lawful price was that set forth in the Kansas order; (2) after July 16, 1954, the only lawful price was that on file with the FPC, "* * * *and plaintiff does not base its claim upon that filed rate*"; or (3) if the Kansas order was ineffective during the period from January 1, 1954, to July 16, 1954, or if defendant had no rate on file with the FPC, the only lawful price would have been that prescribed by the Natural Gas Act (15 U.S.C., §717, *et seq.*), "* * * *and plaintiff does not base its claim upon that Act.*"[9]

In answer to Texaco's brief in support of its motion, Cities pointed out that the Kansas order was void *ab initio;* that the rate schedule which Texaco filed with the Commission in compliance with Order 174 was the contract in effect as of June 7, 1954, and that, therefore, Cities' claim for recovery was not inconsistent with or barred by the contract-rate-schedule filed by Texaco (R. 773-779). In its reply brief, Texaco for the first time raised the contention that Section 22 of the Natural Gas Act precluded the

[9] Pan American also filed a Motion for Summary Judgment on identical grounds, but its motion has not yet been disposed of by the Superior Court (R. 656). Additionally, Cities has filed a Motion for Summary Judgment, which has not been disposed of by the Superior Court.

Delaware state courts from entertaining Cities' causes of action because that section conferred exclusive jurisdiction of Cities' causes of action in the Federal District Courts (R. 4, 11-12).[10]

Since the issues before the Superior Court of Delaware included the jurisdictional question raised in Texaco's reply brief, as well as the merits of its Motion for Summary Judgment, the Court disposed of all such issues (R. 8-21). While we thoroughly disagree with the version of the decision of the Superior Court set forth in Petitioners' brief, the decision speaks for itself and we do not deem it necessary to restate that decision. Moreover, that decision is not subject to review here, since it was an interlocutory order from which no appeal could be taken. Suffice it to say, however, that the Superior Court held Texaco's contention that it lacked jurisdiction "to be without merit." It agreed with Cities that "The Actions here asserted are based on contracts and/or restitution and not on the Natural Gas Act * * *" (R. 13). It also found that there was no inconsistency between Cities' claim for recovery and the rate schedule filed with the Commission by Texaco and for these reasons denied Texaco's Motion for Summary Judgment (R. 14-21).

Thereafter Petitioner Texaco, joined by Petitioner Pan American, instituted an original action by petitioning the Supreme Court of Delaware for a writ prohibiting any further proceedings in Civil Actions 671 and 722 (R. 1-7). The sole ground for such petition was that "a state court has no jurisdiction of the subject matter of these civil

[10] Because Texaco made this jurisdictional attack as an afterthought in its reply brief, the Superior Court permitted Cities to file a supplemental memorandum as to the jurisdictional question.

actions" (R. 2). Relying solely on Section 22 of the Natural Gas Act, Petitioners averred that exclusive jurisdiction was vested in the federal courts (R. 5-6). The Petition for a Writ of Prohibition was denied by a unanimous Court (R. 33-48).[11] The decision of the Delaware Supreme Court denying prohibition is now before this Court on *Certiorari*.

SUMMARY OF ARGUMENT

Although more than seven years have elapsed since the Kansas order was issued in 1954, and more than three years have now passed since this Court's invalidation of that order in January, 1958, the controversy has not as yet passed the threshold question as to the proper forum for adjudicating Cities' claims. In their petition for a Writ of Prohibition, Petitioners contended that the state court lacked jurisdiction of the subject matter of Cities' complaints: Relying on Section 22 of the Natural Gas Act, Petitioners contended that the Federal District Courts have exclusive jurisdiction to entertain Cities' causes of action.

Petitioners conceded below that the jurisdictional question was the sole issue involved in their Petition for a Writ of Prohibition. In the court below Petitioners took the

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[11] Petitioners' version of the Supreme Court of Delaware decision also leaves much to be desired, but, again, we believe the decision speaks for itself.

position that a determination of what is the filed rate was unnecessary to a resolution of the jurisdictional question.[12] Reversing their position here, Petitioners assert that the filed rate is what they say it is and that Cities is seeking to collaterally attack that rate. It is obvious that this latter point is not in issue since this question goes to the merits of Petitioners' defense, rather than the jurisdiction of the state court to entertain the causes of action.

Part I of this Argument is devoted to straightening out Petitioners' confusion of arguments as to the merits with arguments on the matter of jurisdiction. In presenting arguments which go to the merits of Petitioners' "filed rate defenses" or to the judgment which should be rendered by the trial court, Petitioners have confused the question of jurisdiction with the wholly unrelated question as to the judgment which should be rendered in the trial upon the merits. *Montana-Dakota Util. Co.* v. *Northwestern P.S.C.*, 341 U.S. 246, 249 (1951). Jurisdiction of the trial court does not turn upon the result which should be reached in a case, but is simply the power to hear the case and decide it one way or the other.

In Part II of this Argument we demonstrate that jurisdiction of the federal courts vested by Section 22 of the

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[12] Petitioners stated in their main brief in support of the Writ of Prohibition (R. 30):

> "We submit that the sole question that is before this Court and was before the Superior Court on defendants' motions is this:
>
> "Assuming defendants' filed rates are as the plaintiff claims, identical with what it claims are the contract prices, do the courts of this state, or any state, have jurisdiction to entertain a claim based upon the contract prices?
>
> "This question very obviously does not reach the dispute between plaintiff and the defendants of whether the filed rates are what the plaintiff claims or what the defendants claim."

Natural Gas Act is limited to those cases which are *brought* to enforce a liability created by the Natural Gas Act, or regulations of the Federal Power Commission. Section 22 has no application to cases in which the defendant relies upon defenses based upon the Natural Gas Act or upon alleged acts or orders of the Federal Power Commission.

The plaintiff is the master of its lawsuit. It may choose the legal theory upon which it will rely. Where, as here, plaintiff pleads common-law theories as its cause of action, a state court has jurisdiction over the litigation. Once state court jurisdiction attaches, it continues, notwithstanding defendant's injection of federal defenses.

The Congress and this Court have historically regarded state courts as perfectly adequate tribunals for the decision of federal questions injected into cases as a matter of defense. However, Petitioners urge that this Court depart from its traditional construction of federal jurisdictional statutes, similar to Section 22, by the determination of jurisdiction from matters alleged in both the complaint and the answer. Although this is contrary to all announced tests of jurisdiction, they argue that federal court jurisdiction would promote uniformity of decision (Pan American Brief, pp. 47-57; Texaco Brief, pp. 25-29). This Court has long ago rejected this argument. Uniformity of decision is assured by the right of review in this Court.

Petitioners' assertion that Cities cannot rely on common-law rights is at war with this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956), which held that the Natural Gas Act did not abrogate private contract rights. If, as stated in *Mobile*,

the Act preserved the integrity of contracts, then it necessarily follows that the Act does not preclude state court jurisdiction to vindicate contract rights.

In Part III we show that Petitioners' filed rate defenses fly in the teeth of *Natural Gas Pipeline Company of America* v. *Federal Power Commission*, 253 F.2d 3 (3rd Cir., 1958)[13] and *Cities Service Gas Company* v. *Federal Power Commission*, 255 F.2d 860 (10th Cir., 1958)[14] Those decisions hold that since the minimum price orders were void *ab initio*, the legally effective rate accepted by the Commission was the rate fixed in the valid and binding contract between the parties as of June 7, 1954. Petitioners seek to avoid the holdings in these cases, which they admit would be otherwise controlling, by accusing Cities of having failed to exhaust administrative remedies.

The record shows, however, that there was no reason for Cities to protest or to exhaust administrative remedies because: (1) Order 174 required Petitioners to file their contracts effective and applicable as of June 7, 1954; (2) the rate schedules tendered by Petitioners reflected the conditional basis upon which Cities agreed to pay the Kansas ordered price as of June 7, 1954; (3) in tendering their rate schedules Petitioners never claimed that they had an unconditional right to an 11¢ price; (4) in accepting the documents tendered by Petitioners, the Commission was careful not to disturb substantive rights.

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[13] *Cert. denied, sub nom., Dorchester Corporation* v. *Natural Gas Pipeline Co.*, 357 U.S. 927 (1958).

[14] *Cert. denied, sub nom., Magnolia Petroleum Co.* v. *Federal Power Commission*, 358 U.S. 837 (1958).

Since the record shows that the Commission carefully preserved Cities' contract rights in accepting the rate schedules for filing, the cases cited above are controlling and cannot be distinguished. Hence, under the holdings in those cases, the contract rate is the rate which was in effect as of June 7, 1954.

Petitioners cannot point to a single order of the Commission with respect to their rate schedule filings determining rights adversely to Cities which would have necessitated the exhaustion of administrative remedies. The tabulation on which Petitioners rely, shows that the 11¢ price was being paid in accordance with the Kansas order and the minutes show that the Commission accepted the basic contract which made payments of the Kansas ordered price conditional on its validity. Moreover, the far-fetched assertion by the Petitioners that a tabulation attached to the minutes of a private meeting by the Commission show that the Commission accepted an unconditional rate of 11¢ is rebutted by the fact that the Commission would not determine rights adversely to Cities without providing for notice or a hearing and without making necessary findings.

The fact that the Commission made no substantive determination of rights is evidenced by the fact that its Order 174 made no provision for notice or hearing as to producer's rate schedule filings or the acceptance thereof.

That Cities is not seeking to collaterally attack a filed rate, and that there is no issue here involved within the primary jurisdiction of the Commission is evidenced by the Commission's order issuing a certificate to Pan American wherein it held that the price issue may be reasonably left for disposition in the state courts (Appendix A, hereto).

The Delaware Court merely held that a state court has jurisdiction to interpret a rate schedule in order to resolve a federal question injected defensively. Since there is no assertion here that the rate on file with the Federal Power Commission is unreasonable, the decisions in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1956) and other related cases, relied on by Petitioners for their collateral attack argument, are inapposite.

The assertion that the Commission has modified Cities' rights to refunds is at war with the Commission's order requiring Cities to make refunds to its jurisdictional customers if successful in this and similar litigation.

The thrust of Petitioners' contentions is that they may retain the full benefits of the Kansas order in the teeth of its invalidation by this Court, thereby rendering for nought: Cities' persistence in pressing for such invalidation; Cities' letter of January 21, 1954, reserving its rights to refunds; Petitioners' agreement to make such refunds; and indeed, the very fact of invalidation itself. Acceptance of Petitioners' arguments would not only mean that Cities and its customers would be denied refunds for payments under the Kansas order for the seven years which have already elapsed since such order purported to become effective in January, 1954; but Petitioners, and producers similarly situated, would continue to receive payments pursuant to the invalid Kansas order for an indefinite period in the future. Petitioners' contention that it is the Natural Gas Act which preserves their right to receive the invalidated Kansas price makes a mockery of the Act's

purpose to protect consumers and flies in the teeth of this Court's decision holding the Kansas order void, because it conflicted with the provisions of the Natural Gas Act.

I.

THE SINGLE QUESTION TO BE DECIDED BY THIS COURT IS WHETHER OR NOT THE SUPERIOR COURT OF NEW CASTLE COUNTY, DELAWARE, HAS JURISDICTION TO HEAR AND DETERMINE THE CASES NOW PENDING BEFORE IT.

The fundamental error of Petitioners' position lies in their confusion of the question of jurisdiction of a trial court with the question as to what judgment the trial court should enter.

The source of this confusion is explained in *Montana-Dakota Util. Co.* v. *Northwestern P.S.C.*, 341 U.S. 246 (1951). In that case the Court of Appeals had held that the trial court lacked jurisdiction because the complaint collaterally attacked a filed rate.[15] In reversing the Court of Appeals' ruling, this Court held:

> "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. * * * To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no

[15] Bear in mind that the complaints here made no mention of Petitioners' filed rate, much less, attacked them.

merit, as well as to decide that it has" (341 U.S. at 249).

It is vitally important to a proper consideration of this case to constantly bear in mind that *Certiorari* was granted to review an order of the Supreme Court of Delaware rendered in an original action which denied Petitioners' Application for a Writ of Prohibition. The single question presented to and decided by the Delaware Court was whether or not the trial court had jurisdiction, not to render a particular judgment, but to entertain the cases before it.

In the Delaware Supreme Court Petitioners emphasized that the merits of their "filed rate" defenses were not before the court. Thus, they stated:

> "This question (as to the trial court's jurisdiction) very obviously does not reach the dispute between plaintiff and the defendants of whether the filed rates are what the plaintiff claims or what the defendants claim." (R. 30).

Because of the limited nature of the proceeding, the Supreme Court of Delaware decided this single question:

> "* * * The substantial question which emerges, in one form or another, is whether the state courts have jurisdiction to entertain the suits on the refund contracts."
>
> "For the reasons above stated, we are of the opinion that such jurisdiction exists." (R. 46).

The carefully limited decision of the Delaware Supreme Court conformed to the general rule, consistently followed in Delaware, that the remedy of prohibition tests

the single issue as to whether or not the inferior court has jurisdiction to hear and determine the case. The Writ of Prohibition may not be distorted into a substitute for ordinary appellate process or for Writ of Error. *Clendaniel v. Conrad*, 26 Del. 549, 83 Atl. 1036, 1052 (1912); *Knight v. Haley*, 36 Del. 361, 176 Atl. 461, 465 (1934); *Canady v. Superior Court*, 49 Del. 332, 116 A.2d 678, 681-682 (1955).

This Court has consistently confined its consideration to those questions which were *both* essential to the decision of the court below and were passed upon by the court below. *McCullough v. Kammerer Corp.*, 323 U.S. 327 (1945); *Needelman v. United States*, 362 U.S. 600 (1960).

II.

SECTION 22 OF THE NATURAL GAS ACT HAS NO APPLICATION SINCE THE SUITS HERE INVOLVED WERE NOT BROUGHT TO ENFORCE A LIABILITY OR DUTY CREATED BY THE NATURAL GAS ACT.

Petitioners' contention[19] that the Delaware courts lack jurisdiction to entertain the causes of action here involved is predicated on Section 22 of the Natural Gas Act. That section provides, in pertinent part, that federal courts shall have:

> "* * * exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, *brought to enforce any liability or duty created by*, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder * * *" (15 U.S.C.A., §717u).

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[19] Texaco Brief, pp. 25-29; Pan American Brief, pp. 47-57.

Petitioners are met at the outset by the very plain fact that Section 22 of the Act limits the exclusive jurisdiction of the federal courts to those suits in equity and actions at law, *brought* to *enforce* any liability or duty *created by* the Natural Gas Act or any rule, regulation, or order thereunder. The crucial question to be determined, therefore, is whether the suits here involved were *brought* to enforce a liability or duty *created* by the Act, or whether those suits arise from, and were brought to enforce, liabilities or duties arising under or created by the common law. As shown below, the causes of action here involved were brought to enforce liabilities or duties created by the common law, and were, therefore, properly brought in the Delaware state courts.

A. Jurisdiction of the Trial Court Is Determined From Plaintiff's Statement of His Claim.

This Court, on many occasions, has examined the question of state court versus federal court jurisdiction, particularly in connection with the provisions of 28 U.S.C. 1331 and 1338. These sections define the jurisdiction of the United States District Courts over cases which arise under the constitution, laws or treaties of the United States, 28 U.S.C. 1331; and over cases arising under acts of Congress relating to patents, copyrights and trade-marks, 28 U.S.C. 1338. The consistent interpretation which this Court has given to these provisions (parallel to the provisions of

Section 22) is compelling authority against the contrary construction urged by defendants.[17]

Without exception, this Court has held that the single test of jurisdiction under both Sections 1331 and 1338 is the statement of the plaintiff's claim in his complaint unaided by any defense which the defendant may have pleaded, or which plaintiff anticipates the defendant may plead.

Thus, this Court has recognized that the plaintiff is the master of his lawsuit, *The Fair* v. *Kohler Die & S. Co.*, 228 U.S. 22, 25 (1913); *Odell* v. *Farnsworth Co.*, 250 U.S. 501, 503 (1919); that the single test of jurisdiction is the allegations of the complaint; *Henry* v. *A. B. Dick Co.*, 224 U.S. 1, 16 (1912); that from the allegations of plaintiff's complaint the Court must determine the question of jurisdiction; *Taylor* v. *Anderson*, 234 U.S. 74, 75 (1914) and *First National Bank* v. *Williams*, 252 U.S. 504, 512 (1920); and that if the plaintiff's complaint states a common-law cause of action, jurisdiction is fixed in the state court even if plaintiff might have chosen to state a federally created cause of action, *Henry* v. *A. B. Dick Co.*, *supra*. See also *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950) and cases cited.

This traditional construction of 28 U.S.C. 1331 and 1338 should be applied to Section 22 of the Act because of

[17] Sections 1331 and 1338(a) of Title 28 deal with jurisdiction of civil actions "arising under" federal law. Although Section 22 of the Natural Gas Act speaks of suits brought to enforce duties and liabilities created by the Act, the legislative history indicates that Congress intended to create the traditional type of federal jurisdiction for cases "arising under" the Act. *See* H. Rept. No. 709, 75 Cong., 1st Sess.; S. Rept. No. 1162, 75th Cong., 1st Sess., p. 7 (1937).

this Court's "deeply felt and traditional reluctance to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero* v. *International Term. Operat. Co.*, 358 U.S. 354 (1959). The mountainous burden of federal court litigation, which would inevitably follow a determination that jurisdiction under Section 22 is to be determined from the allegations of the answer, is a significant consideration.

B. Cities' Complaints State Only Common-Law Causes of Action.

Examination of Cities' complaints in these proceedings (R. 52-59, 159-160, 232-237, 619-620) makes it clear beyond any doubt that the complaints are predicated wholly and solely on common-law theories of contract, restitution and unjust enrichment—causes of action over which state courts have traditionally exercised jurisdiction.[18] The Natural Gas Act is not even mentioned in Cities' complaints. Nor does Cities rely upon the Natural Gas Act for its recovery.

Indeed, Petitioners (defendants below) have repeatedly admitted that Cities' complaints state only common-law causes of action. (See: Pan American's petition for Writ of *Certiorari*, pages 3 and 6; Pan American's brief in the trial court (R. 616); Texaco's petition for Writ of *Certiorari*, pages 2, 5 and 6; Texaco's brief in the trial court

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[18] The right to recover what has been lost under an invalid statute or judgment subsequently reversed is "• • • well founded in equity [and] has been recognized in the practice of the courts of common law from an early period." *Arkadelphia Milling Co.* v. *St. Louis Southwestern R. Co.*, 249 U.S. 134, 145 (1919). *See also Bank of United States* v. *Bank of Washington*, 6 Pet. 8, 17 (1832); *Erwin* v. *Lowry*, 7 How. 172, 184 (1849); *Northern Fuel Co.* v. *Brock*, 139 U.S. 216, 219 (1891).

(R. 220-230). Moreover, at the close of all the pleadings filed by Cities and Petitioners in the Superior Court of Delaware, each Petitioner filed a Motion for Summary Judgment in which the unequivocal statements are made that:

> "* * * plaintiff does not base its claim upon that [defendants'] filed rate;" (R. 170, 656).
>
> and
>
> "* * * plaintiff does not base its claim upon that [Natural Gas] Act" (R. 170, 656).

Not one word has been added or subtracted from Cities' complaints since the filing of those Motions. Surely, then, if Cities' complaints stated common-law causes of actions at the time the Motions were filed, they state such causes of actions now. In view of Petitioners' repeated admission that the complaints state only common-law causes of action and the fact that the trial court and the Delaware Supreme Court so held, we will not detail the allegations of the complaints.

C. State Courts Are Not Ousted From Jurisdiction When Federal Questions Are Injected Defensively.

From the pleadings, it is apparent that petitioners themselves raised the federal question by way of defending that the recovery sued for was barred by rate schedules filed with the Federal Power Commission pursuant to Order 174 (R. 67, 623-634). Assertion of such defense, however, does not oust state courts of their jurisdiction.

This Court has consistently held that state courts are not ousted of jurisdiction merely because federal questions are injected defensively. *Skelly Oil Co.* v. *Phillips Petro-*

leum Co., 339 U.S. 667 (1950); *Gully* v. *First National Bank*, 299 U.S. 109 (1936); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U.S. 149 (1908); *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U.S. 255 (1897).

In the landmark case, *Pratt* v. *Paris Gaslight and Coke Co., supra*, this Court upheld state court jurisdiction of a contract suit, even though invalidity of a patent was claimed in connection with a defense. The Court said (168 U.S. at 259):

> "The state court had jurisdiction both of the parties and the subject matter as set forth in the declaration and it could not be ousted of such jurisdiction by the fact that incidentally to one of these defenses the defendant claimed the invalidity of a certain patent"

Two federal court decisions which have reviewed substantially identical complaints have found that the claim was founded, *not* upon federal law, but upon contracts deriving their force from state law. *Cities Service Gas Co.* v. *Skelly Oil Co.*, 165 F. Supp. 31 (D. Del. 1958); *Northern Natural Gas Co.* v. *Cities Service Oil Co.*, 182 F. Supp. 155 (D. Iowa, 1959); see also *Pan American Petroleum Corp.* v. *Cities Service Gas Co.*, 182 F. Supp. 439 (D. Kans., 1958).

In the *Pan American* case, *supra*, the Court dealt with the identical contracts involved in case No. 80. Petitioner in case No. 80 filed a Motion with the Federal District Court to remand its action for a declaratory judgment,

originally filed in the state courts of Kansas.[19] In ordering a remand, the Court held that "the right upon which the cause of action is founded is not federal in nature * * *." 182 F. Supp. at 446. It said (182 F. Supp. at 445):

> "The Natural Gas Act imposes certain duties upon the plaintiff as an independent producer. It must file its rate schedules with the Federal Power Commission and conform with its procedures. But the source of the right of action of the plaintiff is the contract; or, in the alternative, the conduct of the defendant in modifying the contract which conduct estops it from asserting its rights under the original agreement."[20]

These removal proceedings are persuasive, we submit, in this review of the Delaware Court's denial of a writ to prohibit the lower court from proceeding to trial.

D. State Court Jurisdiction Over Common-Law Rights Is Not Defeated Even Though a Cause of Action Might Have Been Brought for Violation of a Federal Statutory Right.

It is well established that state courts retain jurisdiction to vindicate common-law rights even where, as here, plaintiff could have declared upon other facets and facts of the same transaction which would constitute a

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[19] The obvious inconsistency between the positions of Petitioner Pan American here and in the District Court for the District of Kansas suggests that Petitioners' jurisdictional contentions before this Court may reflect a reluctance to reach a trial upon the merits, rather than a search for the proper forum.

[20] In that case, Pan American contends that Cities, by its conduct, modified the original contract.

violation of a federal statute.[21] State court jurisdiction over such claims is preserved even under a statute—like the Natural Gas Act—which provides for exclusive federal jurisdiction over civil actions *arising under* the Act. *Condon* v. *Associated Hospital Service*, 287 N.Y. 411, 40 N.E.2d 230 (1942) (copyright act); *Underhill* v. *Schenk*, 238 N.Y. 7, 143 N.E. 773 (1924) (copyright act); *Bert Lane Company* v. *International Industries*, 84 So.2d 5 (Fla. 1955) (patent act); *Respro, Inc.* v. *Worcester Backing Co.*, 291 Mass. 467, 197 N.E. 198 (1935) (patent act).[22]

This Court specifically stated in *Henry* v. *A. B. Dick Co.*, 224 U.S. at 17, that:

> "Although the complainant might have sued upon the broken contract, or brought a bill to declare a forfeiture of the licensee's rights for breach of the implied covenant to operate it only in connection with materials supplied by it, it has elected to sue for infringement. To quote from Judge Shipman's opinion

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[21] Petitioner Texaco insists that "the duty to repay (overcharges) arises from the Act, despite seemingly parallel common law causes of action." Texaco Brief, p. 25. See Pan American Brief, p. 50 and fn. 22. Petitioners rely on *United Gas Pipe Line Co.* v. *Willmut Gas & Oil Co.*, 231 Miss. 700, 97 So.2d 530 (1957), *cert. denied*, 357 U.S. 937 (1958). In that decision, however, state cour jurisdiction over an action alleging *discriminatory* rates was denied *not* because of exclusive federal jurisdiction under Section 22, but because of the primary jurisdiction of the FPC under the doctrine of *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951).

[22] Although 28 U.S.C.A. §1338(a) gives federal courts exclusive jurisdiction of "plain suits for [patent] infringement" (Annotation, 167 A.L.R. 1114, 1116), state courts retain jurisdiction of "suit[s] for damages for breach of a contract not to infringe * * *." (Id. at 1129). See *Henry* v. *A. B. Dick Co.*, 224 U.S. 1 (1912) (dictum). Cf. *Caraway* v. *Ford Motor Company*, 148 F. Supp. 776 (W.D. Mo. 1957) (antitrust laws); *Hand* v. *Kansas City So. Ry.*, 55 F.2d 712 (S.D. N.Y. 1931) (antitrust laws); *Guiterman* v. *Pennsylvania R.R.* 48 F.2d 851 (E.D. N.Y. 1931) (antitrust laws).

in Magic Ruffle Co. v. Elm City Co. supra: 'It was competent for the complainants to take either one of the two remedies . . . . . They could bring a bill alleging an injury to their exclusive rights under the laws of the United States, or, as the residence of the parties gave this court jurisdiction, could bring a proper suit setting up the breach of the contract as the gravamen of their action'."

This survival of state court jurisdiction is persuasively explained by Mr. Justice Cardozo in *Underhill* v. *Schenk*, 238 N.Y. 7, 143 N.E. 773 (1924). Similar results were reached in *Condon* v. *Associated Hospital Service*, *supra*; and in *Bert Lane Company* v. *International Industries*, *supra*. In the latter case the Supreme Court of Florida rejected the contention that federal courts had exclusive jurisdiction of a suit for unfair competition by unauthorized manufacture of a patented device. Noting that it was unnecessary to decide whether plaintiffs could have sued for patent infringement, the court stated (84 So.2d at 7):

> "* * * The patentee may elect to waive the right to sue in a federal court for infringement of his patent and may, instead, proceed in a state court to enforce some right protected by and enforceable under general common law and equitable principles applicable in such state. *Henry* v. *A. B. Dick Co.*, 1912, 224 U.S. 1, 32 S. Ct. 364, 367, 56 L.Ed. 645, and cases there cited."

E. The Natural Gas Act Did Not Abrogate Private Contractual Rights.

It is now firmly established that the Natural Gas Act in no way abrogated or set aside contracts or contract rights existing under gas purchase and sale contracts. *United Gas*

Pipe Line v. *Mobile Gas Corp.*, 350 U.S. 332 (1956), *affirming* 215 F.2d 883 (3rd Cir., 1954). See *Colorado Interstate Gas Co.* v. *F.P.C.*, 142 F.2d 943, 954 (10th Cir., 1944), *affirmed* 324 U.S. 581. *Cf. F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1955), *affirming* 223 F.2d 605 (D.C. Cir., 1955) (Federal Power Act).

In the *Sierra* case, *supra*, the Court of Appeals was concerned with "whether and to what extent the pre-existing right of utilities to enter into enforceable rate contracts has been abrogated by the Commission's power under the Act to regulate rates." After noting that "Congress did not expressly abrogate that right," the Court held that the common-law right to buy and sell electric energy at a contract rate was not abrogated, without a finding by the Commission that such a rate was unreasonable under the Federal Power Act.

A similar result was reached under the Natural Gas Act in the *Mobile* case, *supra*. In that case Mobile had a contract with United Gas Pipeline Company for the supply by the latter of the former's requirements for natural gas. The contract specified the rate to be paid, and was filed with the Federal Power Commission as a rate schedule. Subsequently, United, by its unilateral actions, filed an increased rate with the Federal Power Commission. The Court of Appeals held that, under the Natural Gas Act, a natural gas company cannot wipe out a rate contract simply by filing an increased rate schedule. In reaching this conclusion, the Court noted that a contrary conclusion "would result in further impairment of Petitioner's common law rights."

Both the *Mobile* and *Sierra* cases were unanimously affirmed by this Court. Writing for the Court in the *Mobile* case, Mr. Justice Harlan stated (350 U.S. at 338-339):

> "In construing the [Natural Gas] Act, we should bear in mind that it *evinces no purpose to abrogate private rate contracts as such.* To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that *rates to particular customers may be set by individual contracts.* * * * only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act *permits the relations between the parties to be established initially by contract*, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public."
>
> "* * * *The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.*" (350 U.S. at 343).

It necessarily and unavoidably follows from the *Mobile* and other decisions referred to above that if the Act preserves the "integrity of contracts" such as those here involved, and if the right to enter into such contracts remains "unaffected" by the Act, the right to bring common-law actions stemming from such contracts likewise re-

mains "unaffected" by the Act.[23] It is patently inconsistent, we respectfully submit, to say that the Natural Gas Act did not abrogate private rate contracts and that natural gas companies are free, as before, to set rates initially by such contracts, and then in the same breath to say that rights and obligations are not created by such contracts, but are, instead, created by the Act which did not abrogate such contracts. In short, the Natural Gas Act could not "create" something which already existed.

As has been shown above, the rights upon which the instant suits are predicated are rights which clearly arise out of common law. Those rights existed prior to the Natural Gas Act and persist to this day, subject only to the power of the Commission to alter such rights in accordance with the Natural Gas Act. *Mobile* case, *supra*. We submit, therefore, that the true test as to whether the instant actions can be maintained is whether the right to maintain the action would have existed without reference to the Act. Stated differently, it was not the filing of the contracts with the Federal Power Commission which gave the contracts validity, or which created a right to sue for payments made in excess of the contract price. The filing of the contracts is merely for the purpose of notice and to permit the Commission to exercise its review function. *Mobile* made that abundantly clear.

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[23] That Mobile's right to its contract rate stemmed from its contract and not from the Natural Gas Act, is made all the more clear from *United Gas Pipe Line* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958). In the latter case, the right of United to increase its rates was based on its contract. In the *Mobile* case, no such right was contained in the contract.

Could it be successfully contended that Cities would have no cause of action for breach of contract had Petitioners failed or refused to file the contracts with the Federal Power Commission? We think not. See *Natural Gas Pipe Line Company of America* v. *Harrington*, 246 F.2d 915, 919 (5th Cir., 1957).

This Court has been unwilling to imply an abrogation of common-law rights and remedies without a strong showing of statutory design. This is because "* * * a statute will not be construed as taking away a common-law right existing at the date of its enactment unless that result is imperatively required * * *."

See *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). No policy reason exists for abrogation of Cities' right to relief in state courts. Nor has a showing been made by Petitioners of a statutory design to abrogate common-law rights.[24] Indeed, as is shown above, this Court has unequivocally held that the Natural Gas Act evinces no purpose to abrogate private rate contracts.[25]

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[24] As recited by Texaco (Texaco Brief, pp. 26-29), the legislative history shows that Congress intended to establish exclusive, instead of concurrent, jurisdiction over suits brought to enforce a liability or duty created by the Act; but it does not indicate that Section 22 was intended to abolish state court jurisdiction of claims—like those of Cities—which are "founded * * * upon a private contract deriving its force from state law" (See R. 41).

[25] The contracts filed with the Commission contain a great number of provisions, other than rate provisions (R. 339-553; 68-109) Cf. *Texas Gas Transmission Co.* v. *Shell Oil Co.*, 363 U.S. 263 (1960). Under Petitioners' theory, a suit for violation of any of the numerous provisions of such contract would be a suit brought to enforce a liability or duty created by the Natural Gas Act, inasmuch as such provisions would be just as much a part of the "filed rate schedule" as the price provisions. The mere assertion of such proposition emphasizes the hollowness of Petitioners' theory.

F. Uniformity of Decision Would Not Be Aided By Denying State Court Jurisdiction.

The assertion (Pan American Brief, p. 51) that state court jurisdiction would destroy the "comprehensive scheme of federal regulation," has long ago been rejected by this Court.

The entire scheme of our judiciary, consisting of state and federal courts, is based upon the well-recognized premise that state courts are perfectly capable of deciding federal questions injected into cases as a defense. *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U.S. 255 (1897); *New Marshall Engine Co.* v. *Marshall Engine Co.*, 223 U.S. 473 (1912); *State of Arkansas* v. *Kansas & Texas Coal Co.*, 183 U.S. 185 (1901).

In *Amalgamated C. W. of A.* v. *Richmond Bros.*, 348 U.S. 511, 518 (1954), this Court again expressed its confidence in the adequacy of state judicial systems to pass upon federal questions. There the Court observed that erroneous decisions on federal questions are not confined to state courts.

Pan American's reliance (Brief, pp. 51-53) upon cases involving the National Labor Relations Act and the National Labor Management Relations Act in support of its uniformity argument is misplaced. These cases do not involve the question of state court versus federal court jurisdiction. Rather, these cases involve the question of administrative agency jurisdiction versus court (either state or federal) jurisdiction. *Garner* v. *Teamsters, Chauffeurs and Helpers*, 346 U.S. 485, 490-491 (1953).

Long ago this Court held that uniformity of decision is assured by review afforded by this Court. *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922):

> "This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured * * *."

The foregoing, we respectfully submit, makes abundantly clear that the actions here involved are common-law actions in contract and restitution; that the actions were not brought to "enforce any liability or duty created by" the Natural Gas Act; and that, therefore, such actions do not come within the purview of Section 22 of the Act.

III.

PETITIONERS' FILED RATE DEFENSES HAVE NO MERIT. PETITIONERS' FILED RATE IS THE CONTRACT RATE.

Petitioners seek to have this Court review the merits of their filed rate defenses prior to a trial on the merits of the cases below. As we have emphasized previously, questions as to the merits of Petitioners' defenses are being pre-

maturely raised. However, since Petitioners have devoted major portions of their briefs to the argument that Cities is seeking to collaterally attack filed rates, we shall demonstrate below that these contentions are without substance.

Underlying Petitioners' arguments as to the merits of their filed rate defenses is the false premise that their rate schedule filings fixed an 11¢ rate irrespective of the invalidity of the Kansas minimum price order.

The premise flies in the teeth of the decisions in *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 253 F.2d 3 (3rd Cir., 1958), *cert. denied, sub nom., Dorcester Corporation* v. *Natural Gas Pipeline Co.*, 357 U.S. 927 (1958); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F.2d 860 (10th Cir., 1958), *cert. denied, sub nom., Magnolia Petroleum Co.* v. *Federal Power Commission*, 358 U.S. 837 (1958). In both of those cases the courts held that where producers filed void minimum price orders as part of their rate schedules, the order was a nullity[26] and the legally effective rate accepted by the Commission was the rate fixed in the valid and binding contract between the parties.

In the *Cities Service case, supra*, the Court of Appeals in dealing with the void Kansas order, stated (255 F.2d at 865):

> "* * * When the United States Supreme Court struck down the Kansas order, there was no longer a valid order which could modify the contract rate and the contract rate was the rate effective on June 7, 1954.

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[26] Contrary to Petitioners' repeated assertions, it was the Kansas order —not some Commission action upon the rate schedule—which the Delaware Courts viewed as a "nullity" (R. 20, 45). See Pan American Brief, pp. 13, 17, 18, 38, 50, 53; Texaco Brief, pp. 2, 18, 19, 20.

See Natural Gas Pipeline Company of America v. Federal Power Commission, supra."

As stated above, Petitioners concede that the above holdings are correct. They contend, however, that the above decisions are inapposite because they involved direct appeals from Commission action, whereas here, Cities did not protest Petitioner's rate schedule filings or the Commission's acceptance thereof. Thus, they contend that the filed rate became 11¢ by virtue of Cities' failure to exhaust administrative remedies pursuant to Section 19 of the Act (Pan American Brief, pp. 42-45; Texaco Brief, pp. 19-20).

This argument assumes, of course, that Cities was aggrieved by some Commission action. As shown hereinafter, however, there was no reason to protest because Petitioners' rate schedules accurately reflected the agreement between the parties as of June 7, 1954. In accepting such agreement and the other documents tendered by Petitioners, the Commission carefully preserved Cities' substantive rights. For these reasons, as well as others, there was no need to exhaust administrative remedies.

1. Cities Had No Cause to Protest Petitioners' Rate Schedule Filings Since They Accurately Reflected the Binding Agreement of the Parties As of June 7, 1954.

Contrary to the implication in Petitioners' briefs, there was no reason for Cities to protest Petitioners' rate schedule filings since they accurately reflected the binding agreement between the parties as of June 7, 1954. The basic agreement between Cities and Petitioners provided that Cities agreed to pay a certain price for gas purchased, which

in each case was less than 11¢ per Mcf (R. 69-109, 238-259). The contracts further provided that they were subject to "* * * valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction" (R. 78, 255). Thus, the effect of the 11¢ Kansas minimum price order was to amend the price provisions of the basic agreement if—and only if—the Kansas order was valid.

This was the status of the agreement between Cities and Petitioners as of June 7, 1954, and it is the agreement which is reflected in the rate schedules filed by Petitioners with the Commission. This was the only agreement which Petitioners had and could file with the Commission. This is the only agreement which the Commission could and did accept.

Texaco's Rate Schedule Filing

As stated previously, the rate schedule documents tendered by Texaco in 1954 consisted only of its original contract with Cities, dated June 16, 1949, and a letter amendment thereto (R. 126-138). Texaco did not submit a copy of the Kansas order.[27]

The only reference by Texaco to the 11¢ price was in the billing statements attached to the rate schedule and in such billing statements Texaco noted that the 11¢ price was in accordance with the Kansas minimum price order

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[27] As discussed hereinafter, Texaco, in June, 1957, supplemented its filing to include a copy of the Order and a copy of the January 21, 1954 letter to reflect the conditional and contingent basis upon which it was then collecting the 11¢ price.

(R. 130-138).[28] Since the basic contract filed by Texaco showed that the Kansas ordered price applied, if valid, the rate schedule filed by Texaco reflected the status of the agreement as of June 7, 1954. Texaco made no claim to an unconditional price of 11¢ per Mcf and, therefore, Cities had no reason to protest.

Pan American's Rate Schedule Filing

Cities also had no reason to protest Pan American's rate schedule filing in 1954 because it also accurately reflected the binding agreement of the parties as of June 7, 1954. Pan American tendered the basic contract, numerous supplements and amendments (not material here), and a copy of the Kansas order (R. 591-599). In its covering letter, Pan American expressly stated that the initial rates were "set forth in the gas sales contract" appended to the letter of transmittal (R. 591-592). In tendering the copy of the Kansas order, Pan American specifically recognized that the effect of such order on the basic contract was conditional on its validity (R. 597-598). Like Texaco, Pan

[28] The billing statement, as stated previously, is not a part of the rate schedule (18 C.F.R. 154.93), but is required by a separate regulation to be attached thereto (18 C.F.R. 154.92). The Courts of Appeal have held that the effective rate is derived from the rate schedule without reference to the billing statement. Thus, it is not the amount that was being paid on June 7, 1954, that is controlling, but rather the amount the producer was entitled to by contract as of that date. *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F.2d 470 (10th Cir., 1955), *cert. denied, sub nom., Michigan-Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.*, 250 U.S. 1005 (1956); *Kerr-McGee Oil Industries, Inc.* v. *Federal Power Commission*, 260 F.2d 602 (10th Cir., 1958); *Phillips Petroleum Company* v. *Federal Power Commission*, 258 F.2d 906 (10th Cir., 1958).

American made no claim to an unconditional 11¢ price, and therefore, there was no reason to protest.

Petitioner's Filings in 1957 to Reflect Kansas Severance Tax

Pan American asserts that since July 1, 1957, its filed rate has been 11.0715 by virtue of its filing made in June, 1957, to permit contractual reimbursement of a portion of the Kansas severance tax (Pan American Brief, pp. 5-7).[29] Texaco makes an obscure argument that the Commission's acceptance and allowance of this increase without formal protests by Cities supports its position that the Commission originally accepted an 11¢ rate (Texaco Brief, pp. 10-13).[30]

In 1957 the State of Kansas enacted a 1% severance tax on natural gas. By the terms of the basic contract between Cities and Petitioners, Cities had agreed to bear 50% of the tax in the Texaco contract (R. 78) and 65% in the Pan American contract (R. 255). The Federal Power Commission by its Order 197 (R. 743-745) announced that all producers could file for reimbursement of the tax to the extent allowed by contract, and that such increase would be allowed without suspension or hearing. In June, 1957, Pan American and Texaco submitted their filings to the Commission "* * * pursuant to Commission Order No. 197 to reflect * * * reimbursement of the Kansas tax * * *" (R. 647, 145).

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[29] The Kansas severance tax was held unconstitutional in March, 1958. *State* v. *Kirchner*, 182 Kan. 622, 322 P.2d 759, and is no longer being paid.

[30] The weakness of Pan American's assertion is demonstrated by the fact that Texaco does not claim that its similar filing increased its rate (Texaco Answer, R. 59-68).

In connection with Texaco's tax reimbursement filing, the Commission discovered that Texaco had not submitted the Kansas 11¢ minimum price order as part of its initial June 7, 1954 rate schedule filing; and, therefore, it advised Texaco by letter dated July 13, 1957, that its latest filing was subject to rejection unless it submitted copies of the Kansas 11¢ order and any agreement by buyer to pay the rate on a contingent or conditional basis (R. 149). Pursuant to such letter, Texaco transmitted to the Commission copies of the Kansas 11¢ order, and Cities' letter of January 21, 1954, which it described as "*setting forth the contingent or conditional basis upon which the minimum rate will be paid.*" (R. 153).

Thereafter, the Commission by letter accepted Texaco's filing without mention of a "rate" and subject to the usual qualification in such letters that such acceptance is not "* * * deemed as recognition of any claimed contractual right or obligation associated therewith * * *" (R. 157-158). Thus, it is clear that the Commission was carefully preserving contract rights in accepting these tenders.

Likewise, the Commission's letter accepting Pan American's filing for tax reimbursement made it clear that such acceptance was not "* * * deemed as recognition of any claimed contractual right or obligation associated therewith * * *" (R. 654).

In view of Cities' contractual obligation to reimburse Petitioners for a portion of the severance tax, if valid, and the Commission's careful preservation of contract rights in allowing reimbursement, Petitioners' arguments with regard to their 1957 rate filings are clearly without merit.

The foregoing shows that there was no reason for Cities to protest Petitioners' rate schedule filings either in 1954 or 1957, since they accurately showed the conditional basis upon which Cities was paying the 11¢ Kansas ordered price.

***B.* Cities Was Not Aggrieved by the Acceptance of the Documents Tendered by Petitioners.**

Petitioners make a substantial effort to convince this Court that in accepting the documents tendered by Petitioners the Commission modified Cities' contract rights. Petitioners assert that the Commission without notice, without providing a hearing, and without making necessary findings, modified and set aside Cities' contractual right to refunds and established a legally effective rate of 11¢, irrespective of the Kansas order's invalidity (Pan American Brief, pp. 4-5; Texaco Brief, pp. 7-8). The lack of substance in these contentions is shown by the following facts.

When the Commission acted on these rate filings, it had only recently been advised by this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), that sales of gas by independent producers in interstate commerce for resale were subject to regulation under the Natural Gas Act. In order to implement this ruling, the Commission, on July 16, 1954, issued its Order 174 (later replaced or supplemented by Orders 174-A and 174-B) requiring producers, such as Petitioners, selling gas in interstate commerce for resale, to file their contracts as their "rate schedules" [18 C.F.R. 154.92(a)].

However, since these sales by producers previously had not been regulated, there was neither uniformity in the producer prices nor any general price for a group of sales. To the contrary, each sale by a producer had been separately negotiated between the parties and the terms and conditions thereof were typically embodied in a contract and amendments supplementary thereto, each tailored to the circumstances of the particular transaction involved.

In recognition of the amorphous situation thus prevailing as to producer prices and contracts, the Commission in its 174 series of orders defined "rate schedule" as the "basic contract and all supplements and agreements amendatory thereof, effective and applicable on and after June 7, 1954 * * *" (18 C.F.R. 154.93). It should be noted that there was no requirement as to the filing of any "rate." Nor did the Commission's 174 series of orders purport to determine the rates required to be paid for gas. All that the Commission required was the filing of the above enumerated documents, which *documents* constituted the "rate schedule."

The Commission's acceptance of producer rate schedules tendered pursuant to these requirements were not intended by the Commission to suggest Commission approval of any rate, or even to imply any views as to the effective rate on June 7, 1954.[31] For the Commission to have gone beyond the mere acceptance of the tendered documents for filing would have involved an impossible work load, in view

[31] For example, 18 C.F.R. §154.101 provides: "Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under §7 of the Natural Gas Act."

of the literally thousands of such filings made at that time, their complete lack of homogeneity, and the need for expeditious action in order to begin producer regulation.[32]

Indeed, if the Commission had intended that its acceptance of rate tenders should mean anything more than that the documents tendered complied with the procedural requirements of the Commission's regulations, it would presumably have provided in its regulations relative to these filings, as it did with regard to new sales made after the effective date of the regulations and with regard to rate changes [see 18 C.F.R. 154.92(f)], for notice to interested parties and hearings with regard thereto. The fact that the Commission imposed no such requirements with reference to initial filings of rate schedules effective June 7, 1954, demonstrates further that the Commission's acceptance of these rate schedule tenders merely constituted advice that the documents tendered complied with the Commission's regulations and nothing more.

C. The Commission's Actions Carefully Preserved Substantive Rights.

For the foregoing reasons, the Commission was careful in the promulgation of its regulations, and in accepting rate schedules for filing not to disturb substantive rights. This is shown by the Commission's opinion submitted with Order No. 174-B interpreting the regulations promulgated

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[32] For example, the Federal Power Commission's Thirty-fifth Annual Report (page 108) shows that in the fiscal year 1955 the Commission received 10,978 rate schedule filings from independent producers in that single fiscal year.

for both the filing and acceptance of producers' rate schedules. The Commission stated:[33]

> "4. Many of the petitions for rehearing, although objecting to the lack of notice when the rules were originally adopted, recommended changes which would be of a distinctively substantive nature. Substantive rules, however, do not appear desirable in connection with the filings with which these rules are concerned and it is the intention of the Commission to relate these rules strictly to procedural matters."

In its form letters of acceptance to Petitioners, the Commission was careful to preserve the contractual rights of the parties. The letter made no mention of an 11¢ price but simply listed the documents which had been tendered and accepted for filing (R. 138-143, 601-607). The letter contained the following qualifying provisions (R. 139, 601-602):

> "This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; *nor shall it be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith;* and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company."

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[33] 19 Fed. Reg. 8807.

It is clear that by its action the Commission simply acknowledged that the documents tendered by Petitioners complied with the procedural requirements of Order 174-A, and that the Commission itself did not regard its acceptance of the documents tendered as modifying contract rights. Thus, even if the Commission had provided Cities with an opportunity to protest, there would have been no reason to do so.

1. ***Petitioners' Reliance on the Tabulation Attached to the Commission Minutes Is Without Merit.***

Petitioners rely heavily on a tabulation attached to the Commission's minutes for their contention that the Commission modified Cities' contract rights and established an unconditional legally effective rate of 11¢ per Mcf. Pan American states (Brief, pp. 4-5):

> "On January 26, 1955, the Commission duly convened and, among other matters, considered Petitioner's tendered rate (R. 635, 636). The minutes of this meeting of the Commission show that the Commission construed the tendered rate schedule as providing for a rate of 11 cents per Mcf (footnote omitted). The minutes record that upon the basis of documents tendered and this construction thereof, the Commission entered under 'Summary of Independent Producers Rate Filings—Rates in Effect on June 7, 1954' a rate of 11 cents per Mcf for the sale involved (R. 639). The minutes further record that the Commission voted to accept the tendered rate of 11 cents per Mcf for filing; the rate of 11 cents thus was made effective as the rate accepted by the Commission as the filed rate, and was thereupon entered in the Commission's public files and records as such (R. 636)."

Texaco makes similar contentions (Brief, pp. 7-8).

Petitioners take the far-fetched position that this private meeting by the Commission constituted an adjudication of Cities' contract rights. In the first place, the minutes upon which Petitioners rely show that in a single day the Commission considered and accepted for filing numerous rate schedules which had been filed (R. 222-225, 635-639). Since Pan American's single rate schedule covering sales to Cities consists of 214 pages (R. 281), it does violence to reason to contend that the Commission adjudicated the rights of all parties as to all the rate schedules it voted on in a single day.[34] Indeed, the only mention of an 11¢ price in the minutes, is in the tabulation attached thereto, and such tabulation contains a footnote showing that the price was based on the Kansas order (R. 225, 639). Since the Commission also voted to accept for filing the basic contract between Cities and Petitioners, it is certainly more reasonable to assume that the Commission accepted whatever was the valid and binding agreement between the parties as of June 7, 1954, instead of any given rate. This is particularly so since the Commission regulations specifically provided that this was what the Petitioners were directed to file [18 C.F.R. 154.92(c), 18 C.F.R. 154.93].

Indeed, Petitioners' reliance upon tabulations attached to the Commission's minutes as a determination of substantive rights is wiped out by the Commission's unequivo-

[34] For example, the minutes of the meeting wherein Pan American's rate schedule was accepted indicate that it took 13 separate tables to list the rate schedules that were accepted in a single day. The one table on which Pan American relies consisted of 23 sheets of tabulations (R. 636-639).

cal statements in parallel cases that such lists, even when included in formal published Commission orders, are only what the applicant reported to be the presently effective rates and is "* * * not intended as a Commission determination that the listed rates are the presently effective legal rates." *Pan American Petroleum Corp., et al.*, Docket No. RI60-208, order issued April 22, 1960, rehearing denied June 4, 1960.[35]

Moreover, Petitioners' contentions that the Commission set aside Cities' contract rights and established an unconditional rate of 11¢ per Mcf is effectively rebutted by the Commission's order approving settlement rates for Cities (R. 556-586). Since that order specifically provided that Cities would have to make refunds to its jurisdictional customers of amounts received by Cities for excess payments made pursuant to the Kansas order, it clearly demonstrates that the Commission preserved Cities' substantive rights. It would have been useless to impose such a condition in the rate settlement order if the Commission had destroyed Cities' right to refunds.

There is no reason to presume, as Petitioners suggest, that the Commission intended to modify existing contractual relations without notice, without a hearing and without proper findings based on substantial evidence. There has never been any doubt, even prior to this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra*, that the Commission lacked authority to modify a contract without a hearing and proper findings.

[35] For the convenience of the Court, the Commission order is attached hereto as Appendix B.

As early as 1944, the Court, in *Colorado Interstate Gas Co.* v. *Federal Power Comm.*, 142 F.2d 943, 954 (10th Cir., 1944), affirmed, 324 U.S. 581, stated:

> "* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. Such rates and charges could be modified only after an express finding of unreasonableness."

In light of the foregoing, Petitioners' arguments that the Commission in a private meeting deliberately intended to modify contractual rights without notice, witnout a hearing and without necessary findings, violates the cardinal principle "* * * that a public official is presumed to act in accordance with his authority." *United States* v. *Tarumianz*, 242 F.2d 191 (3rd Cir., 1957).

2. *Petitioners' Certificate Proceedings.*

Equally without merit is Texaco's contention that Cities should have protested at the time the Commission issued it a certificate (Brief, p. 10). The certificate requested and received by Texaco was to continue the service being rendered pursuant to the terms of the basic contract with Cities. The order made no mention of price (R. 173-176, 179-191). This certainly provided no cause for

complaint by Cities.[36] Indeed, if Texaco was dissatisfied with the terms and conditions of the basic contract, and wanted an unconditional rate of 11¢ per Mcf, it should have requested relief from the Commission under Section 5 of the Act.[37]

The certificate issued to Pan American demonstrates the lack of merit in Texaco's arguments.[38] In its order issuing a certificate to Pan American the Commission held (Appendix A hereto):

> "* * * it is neither necessary nor appropriate for the Commission to determine in this proceeding what is the price for the sale by Pan American to Cities, or to pass on the various issues related to this dispute * * *. The dispute between Pan American and Cities Service over the price for this sale is being litigated by the parties in the Kansas courts,[39] and the matter may reasonably be left for disposition by the courts."

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[36] Texaco relies on the *Catco* decision (Brief, pp. 20-21) for the contention that the Commission authorized the 11¢ rate unconditionally. The *Catco* decision simply holds that when the initial price is on its face "out of line," then the Commission must determine whether the price is required by the public convenience and necessity. Here, all prices in the Kansas-Hugoton Field were artificially 11¢ because of the Kansas order. Thus, the Commission authorized a continuation of the service under the terms of the contract, thereby making the Kansas ordered price applicable, if such order as a matter of law was valid.

[37] See, *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, *supra*, 350 U.S. at 344-5, which described the "avenue of relief" available to the seller under Section 5 of the Act, if the contractual terms are improvident.

[38] The facts with regard to Pan American's certificate proceeding, described below, are set forth in the Commission's certificate order issued December 1, 1960, which for the convenience of the Court is attached hereto as Appendix A.

[39] After the Kansas order was declared invalid, Cities resumed payments at the contract price. Thereafter, Pan American filed suit in the Kansas state courts for a declaratory judgment.

Accordingly, the Commission ordered:

> "(C) The issuance of this certificate does not constitute a determination of what was or is the price for the sale by Pan American to Cities Service, and is without prejudice to whatever determinations may be reached on the dispute between Pan American and Cities Service concerning this matter, or the rights of the parties in regard to this matter."

The foregoing demonstrates that at no time has the Commission issued a definitive order determining rights adversely to Cities. For this reason Cities had no cause to protest or object.

D. The Commission Was Not a Proper Forum for Determining the Validity of the Kansas Order.

Since the Kansas order was presumptively valid when Petitioners made their rate schedule filings in 1954 and 1957, the Commission had no choice but to accept such order as part of the rate schedule for whatever it was worth. It clearly would have been improper for Cities to have protested such acceptance prior to the time the order was declared invalid, since the Commission was not the proper forum for determining the validity of the Kansas order.[40]

Thus, a protest at the time of Petitioners' initial rate schedule filing would have been an empty gesture. This

[40] As the Commission has long ago stated, "the appropriate place for the determination of the validity of such state laws is in the courts." *First Iowa Hydro-Electric Cooperative*, 4 F.P.C. 27, 31 (1944). See also *Cities Service Gas Co.* v. *Federal Power Commission*, *supra*, 255 F.2d at 862.

is particularly so since Cities had already preserved its rights by its letter of January 21, 1954, and the Commission was aware of this as evidence by the rate proceeding settlement involving Cities in Docket No. G-2410 (R. 556-586) and the Commission's letter to Texaco in 1957 (R. 149).[41]

E. The Magnolia and Dorchester Decisions Apply With Full Force to the Facts in this Case.

Since the Commission issued no definitive order determining rights adversely to Cities, there was no reason to protest or to exhaust administrative remedies. Thus, Petitioners' attempt to distinguish the decisions in *Cities Service Gas Co.* v. *FPC*, *supra* (hereinafter referred to as the *Magnolia* case) and *Natural Gas Pipeline Co.* v. *FPC*, *supra* (hereinafter referred to as the *Dorchester* case) on such grounds are without merit.

The different circumstances surrounding the *Magnolia* and *Dorchester* cases show why protests were properly lodged in those cases and why here they were not. Unlike Petitioners, Magnolia Petroleum Company did not file its rate schedule for sales to Cities soon after the is-

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[41] Petitioner Pan American relies on *Tyler Gas Service* v. *FPC*, 247 F.2d 590 (D.C. Cir., 1957) and *Portsmouth Gas Co.* v. *FPC*, 247 F.2d 90 (D.C. Cir., 1957). The decisional holdings of the Court of Appeals for the District of Columbia, however, lend no support to Petitioners' position. Even the language which Pan American extracts, moreover, refers not to conduct like that of Cities, but to alleged acquiescence in unilateral rate increases in violation of contract by reason of failure to protest either to the pipeline or to the Commission. In contrast, Cities here at all times made explicit to Petitioners that it challenged the validity of the Kansas order and, accordingly, made its 11¢ payments subject to the outcome of the litigation challenging the validity of the Kansas order.

suance of Order 174. Instead, Magnolia unsuccessfully challenged the validity of such order. *Magnolia Petroleum Co. v. FPC*, 236 F.2d 785 (5th Cir., 1956), *cert. denied*, 352 U.S. 969. When Magnolia finally tendered its rate schedule to the Commission on February 19, 1957 (R. 680), this Court had already issued its decision in *Natural Gas Pipeline Co. of America* v. *Panoma Corp.*, 349 U.S. 44, striking down the Oklahoma minimum price order. Unlike the case here, Magnolia, at the time of its filing, had taken the position that Cities was not entitled to refunds if the Kansas order was declared invalid, and there was litigation pending on this issue. See 255 F.2d at 861.

Since the decision in the *Panoma* case made it clear that the Kansas order was also invalid, and since Magnolia was disputing Cities' rights to refunds, Cities felt it proper to protest Magnolia's inclusion of the Kansas minimum price order as one of the documents in its rate schedule. Cities took the position that the decision in the *Panoma* case made the Kansas order patently invalid (255 F.2d 862, footnote 1).

The Commission entered an order accepting Magnolia's rate schedule, but provided that such acceptance would be without prejudice to the rights of either party in pending litigation (255 F.2d, at 861). On rehearing, however, the Commission eliminated the without prejudice provision from its order. Cities took an appeal from this order. While the appeal was pending, this Court declared that the Kansas order was void. *Cities Service Gas Co.* v. *State Corporation Commission*, *supra*.

The Tenth Circuit set aside the Commission's order in view of the intervening invalidation of the Kansas order

by this Court. However, it ruled that the Commission had acted properly in refusing to pass on the validity of the Kansas order (255 F.2d. at 862, footnote 1):

> "* * * On the pertinent date, June 7, 1954, the authority of the Kansas Commission had been upheld by the Kansas Supreme Court, the highest judicial body that had then considered the precise question involved. It was not the function of the Federal Power Commission to pass on the question of whether or not the Kansas Supreme Court was in error. Good administrative policy dictates otherwise. The inherent difficulties that may arise from a later change in judicial interpretation are not attributable to administrative fault. Our books of law carry many cases requiring reversal of a lower court by reason of a change occurring between trial and appeal."

It is thus apparent that a protest from Cities at the time Petitioners tendered their rate schedules would have been improper because the order at that time was presumptively valid.

Unlike the situation here, both Magnolia and Dorchester, at the time of their rate schedule filings, denied any liability to make refunds to the purchaser for excess payments made pursuant to minimum price orders. Unlike the situation here, litigation was pending between the purchaser and seller as to the price issue.[42] Unlike the situation here, the Commission, in the *Magnolia* and *Dorchester* cases, had issued definitive orders determining rights adversely to the purchasers.

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[42] See: *Natural Gas Pipeline Co.* v. *Harrington*, 139 F. Supp. 452 (D.C. Tex. 1956); 246 F.2d 915 (5th Cir., 1957). The litigation between Cities Service and Magnolia is described in 255 F.2d at 861.

The situation here involved presents a striking contrast. At the time of their rate schedule filings, both Texaco and Pan American had agreed to refund to Cities the payments made in excess of the contract price, if the minimum price order was held invalid (R. 168-169, 611). Neither contended to the Commission or Cities that they were entitled to an unconditional price of 11¢. As late as July 1, 1957, Texaco advised the Commission that it was receiving the 11¢ price upon the conditions and contingencies set forth in Cities' letter of January 21, 1954 (R. 152). Before Pan American accepted its first payment, it agreed in writing to make refunds in accordance with the January 21, 1954 letter (R. 611).

The foregoing shows that the holdings in *Magnolia* and *Dorchester* to the effect that the invalid Kansas order did not modify the contract rates, apply with full force and effect to the facts in this case.

F. The Decisions on Collateral Attack Cited by Petitioners Are Not Applicable Here.

The decisions in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra; T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959); *United Gas Pipe Line Co.* v. *Willmut Gas & Oil Co.*, 231 Miss. 700, 97 So.2d 530 (1958), and *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), all involved attempts by a party, in one form or another, to challenge the reasonableness of a rate on file with a Commission and to have that rate set aside. Petitioners' reliance on these, as well as other related cases, is clearly misplaced (See: Pan American Brief, pp. 20-25).

Cities is not claiming that the rate on file with the Commission is unreasonable, improper, or that it should be set aside or changed. Thus, Cities is in no way seeking to collaterally attack a rate schedule filed with the Commission. Indeed, it is Cities' claim that the contract rate and the legally effective rate contained in the filed rate schedules are one and the same, and for this reason Petitioners' defenses are without merit. Obviously, in order to pass upon Petitioners' defense that the filed rate is 11¢, the state court of Delaware will have to interpret the rate schedule with reference to the pertinent federal law. The lower Delaware court has not been asked to change the rate, nor has it claimed authority to do so.

The Supreme Court of Delaware merely held that a state court has jurisdiction to interpret a rate schedule in order to resolve a federal question injected defensively (R. 44-46). As previously shown, this has been well established since *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, *supra*. In line with the *Great Northern* case, it has been held that the interpretation of a contract on file as a rate schedule with the Federal Power Commission "* * * presents the usual questions of law and fact which a court is authorized to handle. * * *." *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F.2d 60 (6th Cir., 1955), *cert. denied*, 350 U.S. 987 (1956).

Any implication that there is an issue here requiring the exercise of primary jurisdiction by the Commission, is dispelled by the Commission's holding that:

"* * * The dispute between Pan American and Cities Service over the price for this sale is being litigated

by the parties in the Kansas courts, and the matter may reasonably be left for disposition by the courts" (Appendix A, hereto).[43]

The foregoing demonstrates that Petitioners' arguments with regard to collateral attack are patently without merit.

C. The Result Advocated by Petitioners Would Flout the Fundamental Purposes of the Natural Gas Act.

The Federal Power Commission's order approving settlement rates for Cities in FPC Docket No. G-2410 requires Cities to refund to its customers, in accordance with the formula set forth in the order, the major portion of the money obtained from this or similar litigation (R. 556-586).[44] Other pipelines involved in similar disputes must also make refunds to their jurisdictional customers, if they recover excess payments made pursuant to the Kansas order.[45]

Acceptance of Petitioners' arguments, however, would not only mean that Cities and its customers would be

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[43] See Appendices C and D for similar holdings by the Commission in other cases where litigation is pending concerning the effect of the void Kansas minimum price order.

[44] Cities has already commenced making refunds to its customers where it has recovered excess payments made pursuant to the Kansas order. By order issued February 28, 1961, the Commission directed that Cities make substantial refunds to its jurisdictional customers from a settlement of Cities' claim against Socony Mobil Oil Company (formerly Magnolia). *Cities Service Gas Company*, Docket No. G-2410, order issued February 28, 1961 (Appendix E, hereto).

[45] *Northern Natural Gas Company*, 16 F.P.C. 803, 807 (1956); *Natural Gas Pipeline Company of America*, 19 F.P.C. 1002, 1009 (1958); *Colorado Interstate Gas Co.*, 20 F.P.C. 874 (1958).

denied refunds for payments of the artificial price under the Kansas order for the past, but that a revival of the Kansas order would mean that Petitioners, and other producers similarly situated, would receive such payments for the indefinite future.[16]

It is clear, therefore, that the result advocated by Petitioners would contravene the basic purposes of the Natural Gas Act. It has long been established that the primary purpose of the Natural Gas Act was to protect consumers *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 685 (1954); *Atlantic Refining Co.* v. *New York Public Service Commission*, *supra*, 360 U.S. at 388; *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, U.S. , 81 S. Ct. 435, 445 (1961). Because the Kansas order would have interfered with the primary purpose of the Natural Gas Act, this Court struck it down. Petitioners now seek to revive the Kansas order on the basis of arguments which not only are defective for the reasons previously shown herein, but which are clearly overridden by the paramount purposes of the Natural Gas Act.[17]

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[16] *Atlantic Refining Co.* v. *New York Public Service Comm.*, 360 U.S. 378, 389 (1959).

[17] Compare *United States* v. *U. S. F. & G. Co.*, 309 U.S. 506 (1940); *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249 (1954).

CONCLUSION

In view of the foregoing, Cities respectfully submits that the judgment of the Supreme Court of Delaware denying the Petition for a Writ of Prohibition should be affirmed.

Respectfully submitted.

CONRAD C. MOUNT,
CHARLES V. WHEELER,
First National Building,
Oklahoma City 1, Oklahoma;

JACK WERNER,
317 Wyatt Building,
Washington 5, D. C.

Attorneys for Respondent,
Cities Service Gas Company.

Of Counsel

HOWARD L. WILLIAMS,
HENRY N. HERNDON, JR.,
MORRIS, JAMES, HITCHENS & WILLIAMS,
701 Bank of Delaware Building,
Wilmington, Delaware;

HARRY S. LITTMAN,
HAROLD L. TALISMAN,
RICHARD LITTELL,
317 Wyatt Building,
Washington 5, D. C.;

JOHN T. GRANT,
First National Building,
Oklahoma City 1, Oklahoma.

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